No. 394

FILED
SEP 8 1899
JAMES H. MCKENNEY,
Clerk.

Brief of Towle for Petitioner

IN THE

Filed Sept 8, 1899

# Supreme Court of the United States

PACIFIC COAST STEAMSHIP COMPANY (A Corporation),

*Appellant, and Petitioner in this Court.*

v.

BANCROFT-WHITNEY COMPANY (A Corporation), A. HAAS, J. BARUCH and H. W. HELLMAN, Surviving Partners of the Firm of HELLMAN, HAAS & COMPANY,

*Libellants and Appellees.*

## Brief on Behalf of Pacific Coast Steamship Company, Petitioner.

GEO. W. TOWLE, JR.,
*Counsel for Appellant and Petitioner.*

15615

IN THE

# Supreme Court of the United States

PACIFIC COAST STEAMSHIP COMPANY (A CORPORATION),
*Appellant and Petitioner,*
*v.*
BANCROFT-WHITNEY COMPANY (A CORPORATION), A. HAAS, J. BARUCH AND H. W. HELLMAN, SURVIVING PARTNERS OF THE FIRM OF HELLMAN, HAAS & COMPANY,
*Appellees.*

## Brief on Behalf of Pacific Coast Steamship Company, Petitioner.

I.

Referring to the facts stated in the petition filed herewith, petitioner's first contention is, that neither the District Court nor the Court of Appeals had jurisdiction to proceed to a decree upon the libels, in the petition referred to, it appearing that the "Queen" was not within the northern district of California when the libels were filed in the District Court.

That a vessel is within the district when the libel is filed is, by Rule 23, Rules of Practice in Admiralty pro-

vided by this Court, made a necessary allegation of a libel *in rem*.

It cannot be supposed that this Court has made it obligatory upon a libelant to allege, under oath, an idle or needless fact, or to aver that which, if denied, need not be proved. Upon the hearing of the exceptions to the libels the Court found that the "Queen" was not within the district when the libels were filed. The District Court should, thereupon, have dismissed the libels. This, for one reason, because a seizure of the *res* is necessary to confer jurisdiction over it.

Miller *v.* U. S., 11 Wall., 268, 294.
Bruseau *v.* Steam Tug, etc., 4 Fed. R., 459.

And the process of the Court *in rem* does not run beyond the territorial limits of the Court; and a seizure, to give jurisdiction, must be one made within such limits.

Toland *v.* Sprague, 12 Pet., 300.
The Lindrup, 70 Fed. R., 718.
Pinckney *v.* Hungaria, 42 Fed. R., 510.

That a libel *in rem* filed when the vessel is not within the district should be dismissed, upon motion, is held in The L. B. X., 88 Fed. R., 590–596.

No case directly in point is cited by the Honorable Judge of the District Court, nor by the Honorable Judges of the Court of Appeals, in support of their position upon this point. The Court of Appeals upheld the jurisdiction because, as it said, it appears that jurisdiction has heretofore been maintained in cases where, when the libel was filed, the *res* was, while within the Federal district, at the time in the custody of a State Court, citing

The E. L. Cain, 45 Fed., 367; Moran *v.* Sturges, 154 U. S., 256, 279; *Ex parte* Chetwood, 165 U. S., 443, 460; *Ex parte* Johnson, 167 U. S., 120, 125, and saying: "It must be admitted that in such cases the *res* is as much without the jurisdiction of the Federal Court as if it were without the district."

We submit that the conclusion of the Court of Appeals is not justified by the decisions cited. That there is a wide margin between a suspension of proceedings in a case where jurisdiction exists—that is, the suspension of the use of power, to avoid friction—as in the cases relied upon by the Court of Appeals; and this case, where the *res* was not within the territorial limits of the Court when the libel was filed. In the one case the Court has power, but, upon grounds of comity only, temporarily suspends the use of it. In the other case it has no power to use, or to suspend the use of. In the absence of jurisdiction "comity" has no place.

In the "Silver Prince," 1 Ben., 234, cited and approved in Moran *v.* Sturges, 154 U. S., 256, 279–280, which latter case is relied upon by the Court of Appeals, it is expressly held that the possession of the *res* by a State Court sitting within the Federal district does not deprive the Federal Court of its jurisdiction to seize the *res* there situate, but that, upon grounds of policy only, the Federal Court will not intrude upon the possession of the State Court; but will, instead, suspend its proceedings until the *res* passes out from the control of the State Court. The possession of the *res*, by the State Court, is only an obstacle which tends to delay, or to excuse the immediate execution of, the writ of the Fed-

eral Court; just as distance, or physical obstacles, might do; while, if the *res* is not within the Federal district when the writ is issued, the service of the writ is not delayed simply, but the *res* is then beyond the limits to which the writ may ever run, and so long as it remains there—and the legal presumption is that it will so remain—is beyond the possible reach of the writ. In the one case the Federal writ covers the situs of the *res*; in the other it does not. When it does, the question of immediate seizure is one of policy; not of power. When it does not, there is then an entire lack of power to seize.

The question of jurisdiction, as resting upon the situs of the *res*, must be determined upon the facts as they exist when the libel is filed. It may be conceded that the allegation of the libels, that the "Queen" was then within the district, gave to the Court, *prima facie*, authority to issue its writ for the seizure of the vessel. But, as the fact was to the contrary of the averment of the libels, the Court was, by the averment, deceived into doing that which, had the libels truly stated the fact, it would not have done; for surely, had the libels alleged the truth, that the "Queen" was *not* within the district, no writ would have issued thereon, and they would have been dismissed on motion. But being so deceived, the Court should, when the true facts appeared, have done what it would have done in the first instance had the fact, as to the situs of the *res*, been truly stated; that is, have ordered the libels dismissed, upon the ground that as the *res* was not within the territorial limits of the Court when the libels were filed, the libels did not give the Court jurisdiction in the premises.

The question here presented is important, not only in this particular proceeding, but as a principle of Admiralty law of general application upon which there is, at present, a diversity of opinion expressed by Federal Courts in different Circuits. It has never, so far as we can learn, been heretofore presented to this Court for decision. That being so, there is here presented a case of such conflict of decision, upon a fundamental proposition of Admiralty law, as should call into exercise the controlling judgment of this Court in the premises; a case directly within the purview of the provisions of the second paragraph of Section 6 of the Act creating Circuit Courts of Appeals, pursuant to which the petition in this case has been filed in this Court.

II.

Petitioner's second contention is: That the claims against and liens upon the "Queen," resulting in favor of libelants from the shipment of their goods on board of her, expired, terminated and ended long prior to the date that the "Queen" was seized by the marshal under process issued on said libels.

(*a*) In thirty days from the date the goods were shipped.

The following dates are material:

The goods were delivered for shipment on April 28, 1888.

The "Queen" was stranded on April 30, 1888.

The libels were filed on April 28, 1892.

The alias monition, upon which the "Queen" was seized, was issued on May 4, 1892, and the "Queen" was seized on that day.

The libels allege that libelants stipulated, when the goods were shipped, that "It is expressly agreed that all claims against the P. C. S. S. Co., or any of the stockholders of said company, for damage to or loss of any of the within merchandise, must be presented to the company within thirty days from date hereof; and that after thirty days from date hereof no action, suit or proceeding, in any Court of justice, shall be brought against said P. C. S. S. Co, or any of the stockholders thereof, for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss."

It is conceded that libelants knew of the misfortune to the "Queen" as early as May 1, 1888; that they received their merchandise from the "Queen" at San Francisco as early as May 10, 1888; that they sold the same—for cash on delivery and delivery on day of sale—on May 19, 1888; and that no claim for loss, or damage, was presented to the steamship company, or libel filed against the "Queen," until the libels herein were filed on April 28, 1892. The merchandise shipped would ordinarily be delivered to the consignee, at destination, within five days from the date that it was received from the shipper.

These facts appearing, petitioner has contended, and here contends, that the thirty-day stipulation of the contract, above set forth, was reasonable; and, further, that as libelants have alleged it, as their stipulation, they cannot be heard to complain that it was not reasonable;

nor that it was not binding upon them. This upon the familiar rule that one cannot be heard to question the validity of, or to contradict, the contract under which he claims, nor the averments of his own pleading.

The District Court and the Court of Appeals have, notwithstanding, held that the stipulation was not reasonable; and further, that the benefit of it, if reasonable, could only be claimed by the steamship company in a suit against it, *in personam*; not in these proceedings, by libelants, *in rem*.

On the contrary, the Circuit Court of Appeals for the Second Circuit has recently held that a similar stipulation, that is, one the benefit of which was, in terms, limited to the owner, inured to the benefit of the ship, in a proceeding *in rem*.

The Kensington, 94 Fed. R., 885, 888.

And this Court has held specifically, in The Schooner Freeman *v.* Buckingham, 18 How., 183, that in *all* causes of action which may arise during the ownership of the person whose ship is proceeded against, no suit could ever be maintained against a ship where the owners were not themselves personally liable; or where the liability had not been given up, as, for instance, in the case of a bottomry bond. From which it follows, logically, that if the thirty-day clause would bar a suit *in personam*, it must also bar a suit *in rem*.

That the thirty-day clause was, in view of the conditions as to shipment and delivery here shown, reasonable, that is, that it gave to the shipper ample time to know of his loss, or of the extent of the damage to his

goods, and to present his claim to the carrier therefor, in all ordinary cases, and particularly in these special cases, is apparent; and there is no claim, asserted by libelants, to the contrary. The question of the reasonableness of the stipulation was not, therefore, in issue. We submit, therefore, that libelants' claims should be held barred under the provisions of that thirty-day stipulation, for, being pleaded by libelants as their stipulation, compliance with it was a condition precedent to their right to recover against the "Queen."

Where a contract stipulates that notice of loss shall be given within a stipulated time, giving such notice is a condition precedent to recovery.

> Cal. S. B. of S. D. *v.* Am. S. Co., 87 Fed., 118, 120.
> Albers *v.* W. U. Tel. Co., 66 N. W., 1040.
> Angel *v.* Cunard S. S. Co., 55 Fed., 1005.
> Moore *v.* Harris, 34 Law Times (N. S.), 519.

(*b*) That such lien of libelants terminated at the expiration of one year from the stranding of the "Queen," to wit, on April 30, 1889, by virtue of the provisions of Section 813 of the Code of Civil Procedure of the State of California.

That section, so far as material, reads:

"All steamers * * * are liable: 5. For non-performance, or mal-performance, of any contract for the transportation of * * * property between places within this State, made by their respective owners, masters, agents or consignees; 6. For injuries committed by them to * * * property, in this State.

"Demands for these several causes constitute liens

upon all steamers * * * but such liens only continue in force for the period of one year from the time the cause of action accrued."

That section recognizes the existence of certain admiralty liens; creates certain others; and, as to all, provides a statute of limitations of one year.

The contracts alleged in the libels were made at San Francisco and covered the transportation of property from one port in the State of California to another therein; and the property was injured, if at all, in said State. The "Queen" was a domestic vessel, her owner a citizen of the State of California, and the shippers were doing business in said State. This being so, it would seem that the law of the State of California should operate upon and limit the rights of the parties in the premises.

In Liverpool S. Co. *v.* Phoenix Ins. Co., 129 U. S., 397, at page 459, this Court said: "The contract being made at New York * * * both parties must be presumed to have submitted themselves to the law there prevailing, and to have agreed to its action on their contract."

"There is," said Matthews, J., in The Guiding Star, 18 Fed., 266, "no circumstance, it seems to me, that takes from the *local law* its equal force and effect with that of the general maritime law."

And the following cases are to the same effect:

The J. W. Tucker, 20 Fed., 129, 134.

The Arctic, 22 Fed., 126, 128.

The Wyoming, 35 Fed., 548, 550.

The Amos D. Carver, 35 Fed., 665, 666.

The Venture, 26 Fed., 285.
The Menominie, 36 Fed., 197.
Clyde *v.* Transportation Co., 36 Fed., 501, 502.
Lamar, J., in The Madrid, 40 Fed., 677, 678.

In Brine *v.* Insurance Co., 96 U. S., 627, 634, this Court said: "That all the laws of a State existing at the time a mortgage or any contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all Courts which assume to give remedy on such contract."

And that language is quoted, with approval, in M. K. & T. T. Co. *v.* Krumseig, 172 U. S., 351, 359–61.

In Cowley *v.* Railroad Co., 159 U. S., 569, 582, this Court said:

"The statute of a State * * * may establish new rights *or privileges* which the Federal Courts may enforce on their * * * *admiralty* side, precisely as they may enforce a new right given by statute upon their common law side."

Those cases are, we submit, authority for our contention that the State statute referred to has force to limit the duration of the lien upon the "Queen," *prima facie*, to one year from April 30, 1888.

As a statute of limitations, of repose, it should be given the same force as is accorded to other State statutes of limitations, that is, that statute should determine *prima facie* the limit, in time, of the liability of the vessel proceeded against.

"Where there is nothing exceptional in the case,

Courts of Admiralty govern themselves by the analogies of the common law limitations."

Bailey *v.* Sundberg, 49 Fed. (C. C. A.), 583, 586.
Miles *v.* Vivian, 79 Fed., 848, 852–853.
Southard *v.* Brady, 36 Fed., 560.
Cockrill *v.* Butler, 78 Fed., 679.
Ross *v.* Duval, 13 Pet., 45, 60–61.
Campbell *v.* City of Haverhill, 155 U. S., 610.

This question is akin to that which was presented in M. K. & T. T. Co. *v.* Krumseig, 172 U. S., 351—that is, the force of a State statute to limit, or to enlarge, a remedy in a Federal Court. But this statute does not go so far, or cut so deep, as the statute of Minnesota did. That statute cut very close to the jurisdictional line, in that it authorized suits in equity to be maintained upon facts that were not, under the practice in equity, sufficient. This statute does nothing of the kind, but only makes definite and certain that which before rested entirely in the discretion of the Admiralty Court—gives certainty where before was uncertainty, as to the time when liability shall cease.

(*c*) The libelants' causes of action, if any, were barred in three years from the 30th day of April, 1888, by virtue of the provisions of Subdivision 3, of Section 338, of the Code of Civil Procedure of the State of California.

That section is a part of the general State statute of limitations, which, so far as material, reads:

"Section 335. The periods prescribed for the commencement of actions other than for the recovery of real property are as follows: Section 336 * * *. Section

337 * * *. Section 338. Within three years: 1 * * *. 2 * * *. 3. An action for taking, detaining, or injuring any goods or chattels * * *."

And Section 28 of said Code reads: "An injury to property consists in depriving its owner of the benefit of it, which is done by * * * deteriorating or destroying it."

It is to recover for alleged deterioration of property, caused by sea water, that these libels were filed; and nothing is alleged, or shown, tending to excuse the long delay—four years lacking two days from the date the "Queen" was stranded—in commencing these actions. If, therefore, the State statute, as is held by the Federal cases hereinabove cited, fixes, *prima facie*, a limitation for the commencement of these proceedings, then Subdivision 3, of Section 338, should bar libelants' proceedings.

A simple statement of the terms of the statute, the basis of the action, the date of the stranding, and the date the libels were filed, all above set forth, furnishes, as we conceive, a full and sufficient argument upon this point.

But, to avoid the force of Subdivision 3 of Section 338 of the Code of Civil Procedure libelants have contended, and the District Court and the Court of Appeals have held, that the libels count upon a breach of the special contracts alleged by them, and are, therefore, within the provisions of Section 337 of said Code, which reads:

"Section 337. Within four years. An action upon any

contract, obligation or liability founded upon an instrument in writing executed in this State."

This section, as to the scope of it, has been considered, and construed, by the Supreme Court of California; and that Court has uniformly held that the language of the section has reference only "to actions to recover upon an obligation or liability *created by some express promise or stipulation in the written instrument*, and not to actions on such obligations as merely spring from or grow out thereof in some less immediate way."

Thomas *v.* Pacific Beach Co., 115 Cal., 136, 139.

"In order to be founded upon an instrument in writing, the instrument must itself contain a contract to do the thing for the non performance of which the action is brought."

McCarty *v.* Mt. Tecarte L. & W. Co., 111 Cal., 328, 340.

Chipman *v.* Morrill, 20 Cal., 131.

What, then, is the cause of action alleged in the libels? Do they count upon a breach of some express stipulation of the contracts alleged? We submit that they do not. On the contrary, the libels count upon a breach of an obligation imposed by the law, independently of contract, to wit, negligence in permitting the goods to be wet with sea water.

The contract of the carrier, evidenced by the bills of lading, is single and indivisible, that is, to deliver the goods at destination, in like good order as when received, certain perils excepted To make delivery of the goods at destination, and thereby earn freight, was

at all times the right of the carrier, once the goods were shipped; and to have the goods so delivered, upon payment of the freight money, was then the right of the shipper. This being the case, an action, to be based upon the contract of the carrier, must count, in damages, upon its failure to make delivery of the goods at destination, as agreed. But do these libels so count? Most assuredly they do not. Nor, if they did, could such an action, upon the facts here disclosed, be sustained. This for the sufficient reason that the carrier chose to tender delivery, and the shipper chose to accept delivery, of the goods at San Francisco. By so doing the carrier surrendered its right to earn freight money, and the shipper his right to have the carrier make delivery of the goods at destination. There was a sufficient consideration, moving from the one to the other, to support such waivers. Performance of the mutual contracts, of the one to deliver at destination, and of the other to pay for such delivery, was, therefore, by each, excused. So ended such contracts.

That such was the view taken of the matter by libelants, when the libels were filed, is shown by the absence from the libels of any allegation that damage had been sustained by reason of the goods not being delivered at destination. The libels allege only that the "merchandise was wet with sea water during said voyage, which by reason of the *negligence* of said steamship company, its officers and servants, gained access to the interior of said ship where said merchandise was stowed, to wit, on or about the 30th day of April, A. D. 1888." And the *ad damnum* clause is: "That in consequence of the injury

and damage to said merchandise by sea water, as in the last preceding article herein is mentioned and set forth, the libelants have sustained damages in the sum of * * * dollars."

So alleging, the libels count, not upon a breach of any express stipulation of the carrier's contract, but upon negligence; that is, upon an obligation imposed upon the carrier by the law, independently of contract.

Negligence in a carrier is, by the law of this country, placed outside the possible domain of individual contract. The carrier cannot, by any stipulation, however solemn, relieve itself from liability to the shipper for the result of its negligence. From which it must follow that it cannot, by contract, make any binding stipulation relating thereto.

In the John G. Stevens, 170 U. S., 113, 124, this Court said: "But even an action by a passenger, or by an owner of goods, against a carrier for neglect to carry and deliver in safety, is an action for the breach of a duty imposed by the law independently of contract or of consideration, and is, therefore, founded in tort."

Philadelphia & R. R. *v.* Derby, 14 How., 468.
Atlantic & Pacific R. R. *v.* Laird, 164 U. S., 393.
W. M. Co. *v.* M. & O. R. P. Co., 21 Fed., 896, 902.
The Quickstep, 9 Wall., 665, 667.

It, therefore, follows that the causes of action stated in the libels are not within the provisions of Section 337 of the Code of Civil Procedure of the State of California, as that section has been construed by the Supreme Court of that State. And the construction placed upon that

section, by the highest Court of the State, enters into and becomes, in effect, a part of the language of it when it is being considered by a Federal Court.

Bergman *v.* Bly, 66 Fed. (C. C. A.), 40, 43.

We submit, therefore, that the District Court and the Court of Appeals erred in holding that the causes of action stated in these libels were within the provisions of that section.

What we have said, under this second subdivision of this brief, covers the contentions of petitioner specified under Subdivisions Third and Fourth of its petition.

III.

Petitioner's fifth contention is: That proof of the *cost* of the goods was not proof of the *cash value* of the goods at the port of shipment at the date of shipment.

Libelants allege that they stipulated, when the goods were shipped, that "in settlement of any claim for loss of or damage to any of the within mentioned goods, said claim shall be restricted to the cash value of such goods at the port of shipment at the date of shipment."

Proof, by them, of the cash value of the goods at the port of shipment at the date of shipment was, therefore, a condition precedent to their right to recover, in damages, from the carrier. But they made no such proof. All that they showed was that the goods had cost them a stated sum. But there may be a wide and undeterminable margin, either way, between the cost of goods to a merchant and the cash value of the goods upon a given day and at a certain place. That fact is recognized by libelants' stipulation, relating to cash value.

In the H. F. Dimmock, 23 C. C. A., 123, 131, the Court says: "The third subdivision, which is the great one, and the one ordinarily spoken of by the Courts, *covers those articles which have a recognized market value*, and as to which the rule of damages is rigidly held to be limited *according to such value*. With reference to this great class *the cost is no proper element*, and, if admitted at all in evidence, it is admitted, not as bearing directly on the value of the article, but only indirectly, *when the market is limited*, for the purpose of leading up to a determination of what the market value is."

And Story, J., in Alfonso *v.* U. S., 2 Story, 421, 426, said:

"In the first place, the *market value* is necessarily a matter of opinion, as well as of fact, or rather of opinion gathered from facts. How are we to arrive at it? *Certainly not by the mere purchase made by a single person*, or by purchases made by a few persons; for in either case they may have purchased above or below the market price, or the market price may be fluctuating, and the sales too few to justify any general conclusion * * *. The market price or value, therefore, must in most cases, if not in all, be a matter of fact mixed up with opinion, for it must necessarily include a general price or value in the market, deducible from various averages, and approximations, and the different qualities of the same class of goods."

In Froloff *v.* N. Y. C. & H. R. R. Co., 10 Blatch., 16, 18, the Court says:

"Neither Courts nor juries are permitted to assess values upon conjecture. They must have proof of value,

or evidence of such facts as will warrant a deduction of the value with reasonable certainty;" and (page 19): "It is obvious, therefore, that before you can say by your verdict what the value of these lost articles was in November, 1869, you must have some *specific information* on that *precise point*, and it must come from witnesses, or some one witness, who is competent to speak on the subject."

Goodwin *v.* U. S., 2 Wash., 493.
Tappan *v.* U. S., 2 Mason, 393, 400.
U. S. *v.* Tappan, 11 Wheat., 419.
U. S. *v.* 16 Pkgs., 2 Mason, 48, 54.
Wehle *v.* Haviland, 69 N. Y., 448.

The testimony of Mr. Abraham Haas, a witness for libelants (pages 90-102 of transcript herewith submitted), shows, at the very utmost, only that he made a single purchase of goods, and that using copies of invoices in the possession of his firm a clerk, in its employ, some days after the "Queen" was stranded, prepared a statement of the cost of the goods to exhibit to an insurance company. That such statement showed the cost of the goods to be a stated sum, and that the witness knew that the statement was correct when it was so prepared. But the witness did not testify, nor was he interrogated regarding, the cash or the market value of the goods at San Francisco on the day they were shipped, or at any time. The goods were all of a character commonly dealt in, that is, merchandise having a market value dependent upon quality or grade and condition, and therefore within the terms of the decisions rendered in

the H. F. Dimmock, Alfonso *v.* U. S., Froloff *v.* N. Y. C. & H. R. R. Co., and other cases above referred to.

As libelants had sold all of the goods nine years before the trial, producing no samples, and for nearly four years after the sale had made no claim for damages in the premises, petitioner was, at the trial, without knowledge, or the means of knowledge, as to the quality, or the condition, of the goods, or as to whether the designated goods were, in fact, shipped; save as it might obtain the statements of libelants relating thereto. The acts of libelants had deprived petitioner of every means of getting independent information in the premises. We submit that, in such a state of the case, libelants are not entitled to have the rule relating to proof of cash value, at the port of shipment at the date of shipment, relaxed in their favor. But, on the contrary, that they should be held to a strict compliance with the terms of their stipulation in that regard.

IV.

Petitioner's sixth contention is: That the proof that nine different kinds of goods, consisting of 1,551 packages—the contents thereof, as represented by libelants when the same were shipped, ranging in character from drugs and tea to nails—were, without any examination being made as to the contents or as to the condition of the contents of a single package, sold at auction, on the wharf, as one lot and for a lump sum, does not support a finding that the sum realized at such sale was the then market value of the goods so sold.

No testimony, relating to the extent of the damage to

the goods, was offered by libelants, save the testimony of Mr. E. W. Newhall (Transcript, pages 102–112) that a sale of the goods had been made, for libelants, in the manner above stated.

Such a sale does not, we submit, furnish a reasonable basis from which to determine the extent of the damage to, or the then market value of, the goods when sold. It only shows how much some one was willing to pay for a "pig in a poke," so to speak. The bidder at such sale was simply gambling; that is, taking his chances upon the contents and the condition of the contents of the 1,551 packages; not buying, as a merchant, upon an examination of the goods to ascertain their original quality and their present condition. The deliberate opinion of merchants, as to the value of the goods—expressed in the dollars and cents that they were willing to pay for them—was not obtained by such a sale, because they were not given an opportunity for forming an intelligent opinion, in the premises. Nor were the different kinds of goods sold separately, or in reasonable quantities, so that men of moderate means, or dealers in one line of goods only, could compete in the bidding. The sale, as conducted, was not a legitimate commercial transaction, but was a pure gambling venture. The bidder was required to guess what was in the packages, and what was the quality and condition of the goods, and to bid upon such guess; not given an opportunity to examine and to know, and to bid upon such knowledge. We submit that no case, but this, can be found where such a sale as is here shown has been held binding upon a carrier, as showing the extent of the damage to the goods.

In the Marinin S., 28 Fed., 664, 668, the Court says: "To throw a large quantity of goods on the market for sale at auction, as damaged goods, upon such slight examination, at the assumed risk and loss of the vessel, appears to me to be as unreasonable and unjust as it would be ruinous in its results to carriers. Looking to the just protection of the interests of carrying vessels, as well as of consignees, a Court of Admiralty cannot support any such unreasonable and precipitate action."

Wolff *v.* The Vaderland, 18 Fed. R., 733, 736.
Tronson *v.* Dent, 8 Moore P. C., 419.

That prices realized at sales at public auction, where the sales were properly conducted, have been held evidence of the market value of the goods sold, is not in conflict with petitioner's contention; for it may be conceded that where the goods are shown to have been open to the inspection and examination of the bidders, and the bidders have examined the same; and the different kinds of goods have been sold separately and in reasonable lots or quantities; that then the deliberate opinions of merchants—evidenced by the prices they were willing to pay—as to the value of the goods sold, may be as reliable evidence upon that point as can be obtained. Had this sale been shown to have been so conducted, we should not be here heard protesting. In the one case we have the opinion of merchants based upon knowledge; in the other, the opinion of a speculator based upon his imagination. While the former is competent evidence, the latter is not.

V.

Petitioner's seventh contention is: That the bill of lading containing the reservation on behalf of the "Queen" that the goods were in "apparent good order" and that the "contents and condition of contents were unknown to the steamship company," it was incumbent upon libelants to prove, before they could recover in damages, that the packages contained the specified merchandise and that the merchandise was in good order when delivered to the "Queen."

No evidence, other than the bill of lading, was offered by libelants upon any of the points here specified.

"There is no presumption that the goods were in good order when received by the carrier."

5 Am. & Eng. Encyc. of Law (2nd Ed.), pp. 353–4.
Marquette, etc., *v.* Kirkwood, 45 Mich., 51.
Smith *v.* New York, etc., R., 43 Barb., 225.

"A bill of lading which acknowledges the receipt of a specified number of packages, but contains the phrase 'contents unknown,' cannot ordinarily be evidence of what the packages contained."

4 Am. & Eng. Encyc. of Law (2nd Ed.), 523.
Vernard *v.* Hudson, 3 Sumn., 405, 407.
The California, 2 Sawy., 12.
Hadden *v.* Parry, 3 Taunt., 303.
Fasset *v.* Ruark, 3 La. Ann., 694.
Miller *v.* Hannibal, etc., R., 90 N. Y., 430.
Clark *v.* Barnwall, 12 How., 272, 273.

"The words 'contents unknown' being annexed to a bill of lading, imply that the master only meant to acknowledge the shipment in good order of the cases as to outward condition."

Clark *v.* Barnwall, 12 How., 272, 273.

Where the bill of lading contains the reservation that the specified packages are "in apparent good order," or "value, weight and contents and condition of contents are unknown," or some reservation of that kind, the burden is on the shipper to prove the actual contents and condition when shipped.

Schultz *v.* The Pietro G., 40 Fed., 497.
The Andover, 3 Blatch., 303.
Nicol *v.* Castle, 9 Bomb. H. Ct. R., 321.
Jessel *v.* Bath, L. R., 2 Exch., 267.
The "Vicenzo T.," 10 Ben., 228.
The Columbo, 3 Blatch., 531.
Wentworth *v.* The Ship Realm, 16 La. Ann., 18.

"The rule as to burden of proof in an action against a carrier for loss or injury to goods is, that the plaintiff is first bound to show affirmatively a receipt of the goods in good order, by the carrier."

5 Am & Eng. Encyc. of Law (2nd Ed.), p. 353.

The bills of lading containing the specified reservations, and libelants not having tendered any evidence, other than the bills of lading, that the packages contained, when shipped, the specified merchandise, or that the same was then in good order, libelants have, under the authorities cited, failed to maintain their case.

## VI.

Petitioner's eighth contention is: That the stranding of the "Queen" at Port Harford was a peril of the sea, and was the proximate cause of the goods being wet with sea water; and that the "Queen" was *prima facie*, and until negligence upon the voyage was shown, released from liability for damage so caused, by the express stipulations of the bill of lading.

"Stranding is a peril of the seas."

15 Am. & Eng. Encyc. of Law, p. 376, and note "Stranding" and cases cited.

The Cressington, L. R. Prob. Div. 1891, 152, 160.

And a voluntary stranding, as shown in this case, to escape from an impending *vis major*, is a peril of the seas.

Redman *v.* Wilson, 14 M. &. W., 476, 482.
Bales of Cotton, 8 Blatch., 221.
Potter *v.* S. Ins. Co., 2 Sumn., 197.
Fitzpatrick *v.* Bales of Cotton, 3 Ben., 42.
Rathbone *v.* Fowler, 6 Blatch., 294.

"In all cases the law regards the proximate cause of the loss," and stranding is a peril of the seas, "even if so connected with a state of unseaworthiness as that it would prevent any one who knowingly sent her out in that state from recovering indemnity for their loss."

Dudgeon *v.* Pembroke, L. R. 9 Q. B., 581, 595.
Durham *v.* Musselman, 2 Blackf., 96.
Railroad Co. *v.* Reeves, 10 Wall., 176.
Chicago, etc., R. Co. *v.* Elliott, 5 C. C. A., 347.

15627



But the District Court found, and the finding is not disturbed by the Court of Appeals, that the "Queen" was seaworthy when she sailed.

In Redman *v.* Wilson, 14 M. & W., 476, 482, Baron Parke, in delivering the opinion of the Court, said:

"The jury having found that the ship was seaworthy when she sailed from London. * * * the only question discussed upon the argument was whether the loss was occasioned by the perils of the sea; and it was contended, on behalf of the defendant, that the attention of the jury ought to have been directed to the negligent mode of handling the cargo, and that if they thought the loss was the result of such negligence, the defendant was entitled to a verdict. But it appears to us that the rule '*causa proxima non remota spectatur*' applies to this case, and that the immediate cause of loss was the peril of the sea, for the stranding was a loss by a peril of the sea; and if it be said that it was voluntary, it was only to avoid the sinking of the vessel, which would have been a peril of the same sort."

Libelants allege that they stipulated that the "Queen" "shall not be held responsible for any damage or loss resulting from * * * any * * * accident, or dangers of the seas, rivers, roadsteads, harbors, or of sail or steam navigation of whatever nature or kind soever."

Proctor for libelants, in his opening statement to the Court, at the trial, said: "When she (the "Queen") got within about three or four hundred yards, two or three hundred yards, of the wharf where she usually made fast, she sank; the water came up in the engine room, the

fires were extinguished, and the vessel sank, I think in about seventeen feet of water:—I am not sure about that. The consequence was, that all the merchandise on board of her was submerged." (Transcript, p. 89.)

Thus, we have the statement by libelants that the merchandise were wet as the result of the stranding.

But the authorities establish that stranding is, *prima facie* at least, a peril of the seas. And libelants allege that they expressly stipulated that the "Queen" should not be liable for damage resulting from a peril of the seas. The loss complained of is, therefore, shown to be within an exception in the bill of lading.

Libelants alleged that the goods were wet as the result of negligence. Their proofs show, only, that the goods were wet as the result of a stranding. But stranding is an excepted peril.

"In this stage and posture of the case the burden is upon the plaintiff to establish the negligence, as the affirmative is upon him."

Clark *v.* Barnwall, 12 How., 272, 280.
The New Orleans, 26 Fed., 44.

But the District Court found, and the finding was not disturbed by the Court of Appeals, that there was no negligence upon the voyage; and libelants made no effort to show that there was. On the contrary, they rested entirely upon the presumption which they claimed arose from the fact that the goods were wet with sea water, as the result of the stranding. It was not shown, or claimed, that libelants' goods were reached by any water that entered the "Queen" prior to the stranding.

We submit, therefore, that the burden of proof was upon libelants, to show negligence in the stranding; and that as no proof of such negligence was offered, even, they should fail in these proceedings.

VII.

Petitioner's ninth contention is: That the carrier's whole duty to the shipper is performed when it furnishes a seaworthy vessel, properly officered, manned and equipped, and is guilty of no negligence in handling, or stowing, the goods, or in navigating the vessel on the voyage.

In Lawrence *v.* Minturn, 17 How., 104, 112, this Court said:

"In general, the owner warrants the sufficiency of his vessel to carry the cargo put on board by the freighter, provided the vessel be not injured by a peril of the sea. Besides this he contracts for the use of due care and skill in stowing the cargo and in navigating the vessel."

When entire seaworthiness is shown to have existed at the inception of the voyage, it will rebut a presumption of negligence arising from the fact that the goods were wet as the result of the vessel springing a leak, or leaking, while on the voyage—that is, the presumption, in such case, will be that such leak was, if unexplained, the result of a peril of the sea.

The Edwin I. Morrison, 153 U. S., 214.

The Compta, 4 Sawyer, 377.

That the "Queen" was entirely seaworthy when she sailed is found as a fact by the District Court, and the finding was not disturbed by the Court of Appeals.

But, as the "Queen" was not shown to have encountered tempestuous weather, and no specific cause for the leak was shown, or known, nor the particular locality of it pointed out; other than as being in the side of the vessel within the area of the starboard alleyway; and as it appeared that there were movable dead lights in the side of the vessel, within that area, which were shown to have been properly closed and fastened when the "Queen" sailed, and to be situate so near to the water line—within eighteen inches of it, in smooth water—that had one been open when the steamer sailed water would have entered it, and have continuously flowed through it, for more than eleven hours before water was discovered to be entering the vessel; the sea, during that time, constantly washing much above the level of the dead lights; and the Court finding that the evidence all tended to show that water could not have been entering the starboard alleyway but a very short time before the water was discovered on the engine room floor, and that the dead lights could not have been reached by any one on board the steamer during the voyage; and it appearing that a diver had succeeded in finding, and in stopping, the leak, at Port Harford, so that the "Queen" did not leak while being towed back to San Francisco, the District Court reached the conclusion that water had entered the "Queen" through a dead light, and that she was liable for libelants' damage, in the premises; and this conclusion was concurred in by the Court of Appeals.

Libelants did not, in their libels, or by evidence at the trial, show, or claim, that a dead light was the aperture

through which the water had entered the "Queen" prior to the stranding. Petitioner showed, by the master of the "Queen" and others of her crew, the general locality of the leak, the time that it first became known, and the extent and effect of it, and that no one on the vessel knew what it was that had caused it.

Libelants did not, by cross-examination, or otherwise, endeavor to ascertain, or to show, the exact size, or locality, of the aperture.

Petitioner tried the cases upon the theory announced in The Edwin, 87 Fed., 540, 542, to wit:

"The claimant is not required to present either a theory or an explanation. He may content himself with adducing evidence sufficient in weight to counterbalance that produced by libelant in support of his particular theory."

And, in reliance upon the rule stated in The Edwin I. Morrison, and The Compta, above cited, that is, that seaworthiness at the inception of the voyage, and due care during it, when shown, raise a presumption that damage to goods from sea water—bad stowage not being claimed—results from a peril of the sea; thus bringing the cause of the damage within one of the excepted perils, and placing the burden of proof of negligence upon libelants.

In The Compta, 4 Saw., 375, 377, the Court says:

"The carrier to make good his defense is bound to show that the damage arose from a sea peril. It is not enough for him to show that it might have arisen from that cause. He must prove that it did. *This proof* can be afforded either by showing a sea peril of such a

character that injury to the vessel, however staunch and seaworthy, would be its natural and necessary consequence; or, by direct testimony of those who observed its effect upon the ship; or, by proving her condition on her arrival; or, *he may exclude every other hypothesis of causation*, by satisfactory proof that she was tight, staunch and seaworthy at the commencement of the voyage."

And this Court, in The Edwin I. Morrison, 153 U. S., 199, 214, states the rule substantially to the same effect

Again, we submit that the evidence relating to the dead lights, above briefly adverted to, is such that the conclusions of the Court that an open dead light—negligently left open when the steamer sailed—was the aperture, cannot be logically drawn therefrom. Such a conclusion not only does violence to all the oral testimony in the case but to the silent, irrefutable testimony of physics as well. The small quantity of water in the starboard alleyway at 2.30 o'clock A. M., and the slight list of the vessel at that time, followed by the large inflow of water and the consequent greatly increased list within half an hour thereafter, furnish conclusive evidence that whatever was the aperture and however it was caused, it had its origin but a few minutes before water was discovered on the engine room floor—intermittently, that is, as the vessel would roll to port, dropping there from a small aperture in the bulkhead of the alleyway situate but four or five inches above the alleyway floor.

"Where the evidence is left in such condition that the Court can give no logical reason for determining the issue in favor of the libelant, it is just that the presump-

tion that the person charged with tort is not guilty, should be maintained."

The Meta, 88 Fed., 21, 22–3.

Rogers *v.* Louisville & N. R. Co., 88 Fed., 462.

Petitioner's tenth contention is sufficiently considered in connection with its second contention herein.

In this brief we have not endeavored to argue the case, upon the facts and the law, with that fullness which the case will demand and receive upon a hearing had with the record certified before the Court. On the contrary, we have sought chiefly to designate the errors complained of, and to show that there are here presented questions of such importance as will justify our petition for the judgment of this Honorable Court in the premises.

We pray the kind indulgence of the Court, and that petitioner's prayer may be granted.

Respectfully submitted,

GEO. W. TOWLE, JR.,
Counsel for Petitioner.